
CANADA / JUDGMENT

R. v. Simmonds

2015 BCSC 737

COURT

Supreme Court of British Columbia

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2015 BCSC 737 R. v. Simmonds

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Simmonds,

2015 BCSC 737

Date: 20150506

Docket: 26599

Registry: Vancouver

Between:

Regina

Respondent

And

Kevin Joseph Simmonds

Applicant

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

February 12-13, 2015

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Vancouver, B.C.

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Overview

- [1] The applicant, Kevin Simmonds, is serving a sentence for first-degree murder. He has applied for a reduction in his parole ineligibility period under s. 745.6(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. This is colloquially known as a "faint hope" application.
- [2] Mr. Simmonds is at the first stage of the parole-review process. Before a jury is empanelled to consider whether to reduce Mr. Simmonds' period of parole ineligibility, he must first satisfy a screening hearing judge that there is a "substantial likelihood" that his application for a parole reduction will succeed before the jury; Code, s. 745.61.
- [3] The addition of a judicial screening stage to the review process occurred in 1997, and was not part of the law when Mr. Simmonds committed his offence in 1995. As a preliminary matter, Mr. Simmonds challenges the constitutionality of the retrospective enactment of this judicial screening phase. He submits that the introduction of the judicial screening stage amounts to a change in the "punishment" for his offence, and that the retrospective enactment of that change violates s. 11(i) of the Charter of Rights and Freedoms [Charter].

Facts and General Framework

- [4] The relevant facts are both limited and straightforward. On April 7, 1997, Mr. Simmonds was arrested and charged with the first-degree murder of William Bedford. The murder occurred on September 16, 1995, near Hope, British Columbia. Mr. Simmonds was tried in the British Columbia Supreme Court for the murder in a jury trial that was presided over by Smith J., as she then was.
- [5] Following the jury's guilty verdict on May 20, 2000, Smith J. imposed the mandatory life sentence without parole eligibility for 25 years pursuant to s. 745(a) of the Code. In 2002, the British Columbia Court of Appeal dismissed Mr. Simmonds' conviction appeal; *R. v. Simmonds*, 2002 BCCA 332.
- [6] Based on the law as it now stands, there are two stages to a faint hope application. At the first stage, the court must determine "whether the applicant has shown, on a balance of probabilities, that there is a substantial likelihood that the application will succeed"; Code, s. 745.61. If the applicant meets this initial threshold test, a jury will be empanelled to hear the application pursuant to s. 745.63.
- [7] At the second stage, if the jury unanimously determines that the number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by a vote of not less than two-thirds, either substitute a lesser number of years of imprisonment without eligibility for parole or terminate the ineligibility for parole; Code, s. 745.63(1)-(5). If the jury agrees to either reduce or terminate the parole ineligibility period, the applicant may then apply to the Parole Board of Canada ("Parole Board"), which will ultimately decide whether the applicant is actually released on parole.

- [8] "Parole ineligibility date" in the faint hope context refers to "full parole ineligibility date". All those serving life sentences are eligible for "day parole" three years before their full parole date; Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 119 [CCRA]. This means that if a jury decides to reduce an offender's full parole ineligibility period, the offender's day parole ineligibility will be correspondingly reduced. Day parole under the CCRA, s. 99(1), generally consists of a grant of parole under the condition that an offender resides at a halfway house in the community. This, for practical purposes, is the only distinguishing feature from full parole where the offender resides on his own but must abide by various conditions of parole while in the community. Those serving life sentences are on parole for life. Accordingly, if they are in the community, they are either on day or full parole.

Legislative History

- [9] The origins of the faint hope provisions in the Code, their subsequent evolution, and their current structure have recently been comprehensively reviewed in *R. v. Jenkins*, 2014 ONSC 3223, at paras. 8-32.
- [10] For present purposes, the following succinct summary from the Crown's submissions is relevant and undisputed:
15. The "faint hope" or parole eligibility regime was created in 1976 as part of a Parliamentary compromise that resulted in the abolition of capital punishment: *R. v. Swietlinski*, [1994] 3 S.C.R. 481, at p. 492.
 16. Until 1997, an applicant had an automatic right to have an early parole eligibility application heard by a jury empanelled for that purpose.
 17. In 1997, the faint hope provisions were amended by An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act, S.C. 1996, c. 34, which was proclaimed in force on January 9, 1997. Three major changes to the legislation were enacted:
 1. anyone who was convicted of a multiple murder after January 9, 1997 or a murder after January 9, 1997 having already been convicted of a murder was no longer eligible to apply for early parole eligibility;
 2. there was no longer an absolute right to a hearing. Rather, a new threshold screening procedure was established where, upon application, the Chief Justice of the province in which the offence occurred (or his or her designate) must consider the application and other written material to determine whether, on a balance of probabilities, the application had a "reasonable prospect" of success; and

3. the Act introduced a requirement for jury unanimity. Until 1997, only eight of twelve jurors needed to agree to reduce the period of parole ineligibility. Following the amendments, all twelve jurors had to agree that an offender's number of years of imprisonment without eligibility for parole ought to be reduced. If the jury determined that the number of years ought to be reduced, it then had to, by vote of not less than two thirds of its members, substitute a lesser number of years or terminate the ineligibility for parole.
18. The 1997 amendments contained a transitional provision [s. 7] which made the latter two amendments applicable to all applications commenced after January 9, 1997
19. In 2011, additional amendments were enacted by An Act to amend the Criminal Code, S.C. 2011, c. 2, which received Royal Assent on March 23, 2011 and came into force on December 2, 2011. Like the 1997 amendments, the 2011 Act contained three amendments to the parole eligibility scheme:
 1. offenders who commit their offences after December 2, 2011 are no longer eligible to apply;
 2. the Act imposed new timelines for the application process. After serving at least 15 years, an applicant will have 90 days in which to apply to have their period of parole ineligibility reduced. If the applicant does not apply within the 90 days, or if the application is unsuccessful, the applicant must wait five years before re-applying; and
 3. the test for judicial pre-screening of applications has been changed. A Chief Justice or his designate must be satisfied on a balance of probabilities that there is a substantial likelihood, rather than a reasonable prospect, that a jury will unanimously agree to reduce the applicant's period of parole ineligibility before an application will be allowed to proceed to a jury.
20. The transitional provision in s. 7(1) provides that the 2011 amendments apply to all applications made on or after the date the Act was enacted:

7.(1) Applications that were made under section 745.6 of the Criminal Code as that section read immediately before the day on which section 3 comes into force and are still not finally disposed of on that day are to be dealt with and disposed of in accordance with the provisions of the Criminal Code as they read immediately before that day.
- [11] In summary, the faint hope process was introduced following the abolition of capital punishment and initially consisted of only the jury hearing stage. The 1997 amendments added the judicial screening stage, introduced jury unanimity, and limited access for offenders convicted of multiple murders. The 2011 amendments increased the standard to be applied at the judicial screening stage, introduced new timelines and abolished the faint hope application process for future offenders. The relevant amendments purport to apply to Mr. Simmonds' application by virtue of the fact that they include transitional provisions that make the changes retrospective.

The Issue Before this Court

- [12] The notice of constitutional challenge filed by Mr. Simmonds raised several distinct issues. As a result of various concessions made by his counsel, those issues are now considerably distilled.
- [13] The applicant no longer relies on s. 7 of the Charter in support of his application. The applicant also no longer challenges the 2011 amendments elevating the threshold-screening standard in s. 745.61 from a "reasonable prospect that the application will succeed" to a "substantial likelihood that the application will succeed".
- [14] The parties have also agreed on various other sub-issues that I will identify shortly, and that are relevant to the analysis of the central question that is being raised.
- [15] The only remaining issue to be determined on this application is whether the 1997 retrospective introduction of a judicial screening process into the faint hope regime (the "1997 Screening Amendment") violates s. 11(i) of the Charter.
- [16] Section 11(i) of the Charter provides:
11. Any person charged with an offence has the right
 - (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
- [17] Since the 1997 Screening Amendment was enacted between the time of Mr. Simmonds' crime and sentencing, the issue in this application turns on whether the amendment amounts to an increase in "punishment" within the meaning of s. 11(i) of the Charter.

The Position of the Parties

- [18] The applicant argues that the 1997 Screening Amendment creates a "substantial risk of additional incarceration" and, thus, represents a change in the "punishment" for the offence of first-degree murder within the meaning of s. 11(i). Because the judicial screening stage was not in force when Mr. Simmonds committed his offences in 1995, it cannot, by virtue of s. 11(i) of the Charter, be retrospectively applied to him.
- [19] The applicant accepts that the various 1997 and 2011 amendments I have identified have created various additional impediments to a faint hope application. In a sense, all of these amendments operate as screens or filters. The applicant argues that judicial screening is, however, different.
- [20] In support of this submission, the applicant emphasizes the sui generis nature of the broad discretionary power given to a jury by s. 745 of the Code. In *R. v Swietlinski*, [1994] 3 SCR 481, at 493-494, Lamer C.J.C., for the majority of the Court, said:

It should also be noted, in the context of an appeal to this Court, that s. 745 gives the jury a broad discretionary power. This is quite different from a trial, at which the jury must choose between two options, guilt or innocence, based on very specific rules of law. Moreover, the discretionary nature of the jury's decision is made quite clear by the fact that Parliament did not see fit to grant any right of appeal to the Court of Appeal, although as I mentioned earlier that does not prevent an appeal to this Court with leave. Consequently, there is no need to analyze the judge's charge to the jury in the detail that would be appropriate in the case of a trial. This Court's function is essentially to determine whether the appellant was given a fair hearing at trial.

The discretionary nature of the decision also compels the jury to adopt a different analytical approach from that used in a trial. At a trial the jury must decide whether it has been proven beyond all reasonable doubt that the accused committed the crime with which he or she is charged. In such a proceeding the offence is generally defined by a number of elements which must all be proven for the accused to be convicted. Each element of the offence is thus a necessary condition for a conviction. At a s. 745 hearing, on the other hand, the jury does not determine whether the applicant is guilty: another jury (or, in some cases, a judge) has already performed that task. Its duty rather is to make a discretionary decision as to the minimum length of the sentence that the applicant must serve. The concept of an element of an offence cannot be transposed onto a discretionary decision. When a person makes such a decision he or she does not apply rigid logic, requiring for example that if conditions A, B and C are met, then decision X must be the result. When legislation lists various factors that a decision-maker must take into consideration a finding reached upon one or all of the factors does not necessarily mandate a conclusion leading to a specific decision. They are instead factors some of which may work in favour of the applicant and some against him, and which must be assessed and weighed as a whole in arriving at a conclusion. This is quite different from a trial where very strong evidence of one aspect of an offence cannot offset the weakness of evidence of another aspect.

Accordingly, the concepts of burden of proof, proof on a balance of probabilities, or proof beyond a reasonable doubt are of very limited value in a hearing pursuant to s. 745, where the decision lies exclusively in the discretion of the jury. The jury must instead make what it, in its discretion, deems to be the best decision on the evidence. (On this point see also *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, at p. 464.)

[21] The difference between the exercise undertaken by a sitting judge and a jury was further developed by Pomerance J. in *Jenkins* at paras. 33-48.

[22] The Crown argues that the 1997 Screening Amendment does not constitute "punishment" within the meaning of 11(i) and was therefore properly applied retrospectively. It submits that it cannot be said that the introduction of the judicial threshold hearing thwarts or frustrates an offender's settled expectation of liberty, or increases the risk of additional incarceration for that offender. The amendment does not lengthen the sentence imposed for the applicant's offence (which is already life imprisonment), or increase the harshness of his sentence by lengthening his period of parole ineligibility and requiring him to serve more time in jail (he must already serve 25 years).

- [23] Moreover, introduction of the threshold hearing does not eliminate the applicant's right to apply for earlier parole eligibility.
- [24] The Crown further argues that there is no assurance that parole ineligibility will be reduced or that parole itself will be granted. The applicant's parole ineligibility remains the same unless a jury agrees to reduce it. Further, a successful jury verdict does not guarantee that applicants will ultimately be granted parole; it simply allows them to make an application to the Parole Board at some point in the future. The Parole Board is the ultimate arbiter as to whether or not an applicant will be released on parole.

The Whaling Decision

- [25] In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, Wagner J., for the Court, addressed s. 10(1) of the Abolition of Early Parole Act, S.C. 2011, c. 11 [AEPA]. That section had eliminated accelerated parole review ("APR") and, with it, the possibility of early release on day parole. The repeal purported to apply retrospectively to first-time, non-violent offenders serving federal penitentiary sentences who were eligible for APR under the system in place when they committed their offences.
- [26] The Court in *Whaling* determined that these retrospective changes to the conditions of a sentence constituted "punishment" and were in violation of the s. 11(h) Charter right not to be tried or punished twice for the same offence; at para. 72. Consequently, the Court determined that the change to the parole system could not apply to offenders who were sentenced before the new legislation came into effect; at para. 89.
- [27] Significantly, *Whaling* developed a framework in addressing what constitutes punishment under s. 11(h) of the Charter:
- [58] First of all, the Court recognized that an offender has an expectation of liberty that is based on the parole system in place at the time of his or her sentencing, and that thwarting that expectation may engage a constitutionally protected liberty interest. Changes to the parole system that add retrospectively to the offender's incarceration may violate s. 7 even if they do not affect the sentence itself. As McLachlin J. put it in *Cunningham*: "One has 'more' liberty, or a better quality of liberty, when one is serving time on mandatory supervision than when one is serving time in prison" (p. 150).
- [59] This being said, Even where a change to the conditions of a sentence engages a liberty interest under s. 7, it may nonetheless be consistent with the principles of fundamental justice. Some line drawing becomes necessary. In my view, this same basic point applies to a retrospective change that constitutes double punishment in the s. 11(h) context. Some retrospective changes to the parole system affect the expectation of liberty of an offender who has already been sentenced to such an extent that they amount to new punishment, while other changes have a more limited impact and do not trigger Charter protection.

- [60] I will not articulate a formula that would apply to every case, because such a formula is not needed to resolve this appeal and the effect of every retrospective change will be context-specific. That said, the dominant consideration in each case will in my view be the extent to which an offender's settled expectation of liberty has been thwarted by retrospective legislative action. It is the retrospective frustration of an expectation of liberty that constitutes punishment. At one extreme, a retrospective change to the rules governing parole eligibility that has the effect of automatically lengthening the offender's period of incarceration constitutes additional punishment contrary to s. 11(h) of the Charter. A change that so categorically thwarts the expectation of liberty of an offender who has already been sentenced qualifies as one of the clearest of cases of a retrospective change that constitutes double punishment in the context of s. 11(h).
- [63] Whether less drastic retrospective changes to parole constitute double punishment will depend on the circumstances of the particular case. Generally speaking, a retrospective change to the conditions of a sentence will not be considered punitive if it does not substantially increase the risk of additional incarceration. As I mentioned above, the dominant consideration will be the extent to which the offender's settled expectation of liberty has been thwarted.
- [28] In *Liang v. Canada (Attorney General)*, 2014 BCCA 190, at para. 45, the court held that this framework also applies to the identification of "punishment" in the context s. 11(i) of the Charter.
- [29] The consequences and importance of Whaling have subsequently been addressed in various decisions. Jenkins and Liang are particularly useful.
- [30] In Jenkins, Pomerance J. considered whether the 2011 increase in the standard to be applied by the screening judge constituted an increase in punishment. Pomerance J. summarized what she perceived to be the three primary consequences of Whaling:
- [58] Whaling marks an important chapter in the evolution of punishment. It is significant in three respects. First, Whaling recognizes the distinction between a sentence and the conditions under which a sentence is served. The change to the parole system in Whaling did not affect or change the offender's original sentence. However, by altering parole status, the legislation did change the manner in which he served his sentence. It affected whether he was to serve his sentence in jail, or under supervision within the community. It affected the conditions of the sentence, even though it did not affect the sentence itself.
- [59] The second major breakthrough in Whaling is the recognition that a retrospective change to the conditions of a sentence could amount to punishment, even though the sentence itself was not affected, and no new or separate proceedings had been instituted.
- [60] The third critical aspect of Whaling is the creation of a framework for determining when retrospective changes to the conditions of a sentence will increase punishment. The court stressed that many changes to parole policy and/or practice will not offend the Charter even

though they affect individual liberty. Section 11(h) is only violated when punishment is increased. How does one make that determination? Wagner J. refrained from stating any absolute formula, but identified, as the dominant consideration, the offender's expectation of liberty at the time sentence was imposed. If the change retrospectively thwarts an offender's settled expectations of liberty, it will be seen as increasing punishment. This was explained at paras. 58-60.

[cites Whaling at paras. 58-60]

- [61] The operative question is: Does the legislative action, applied retrospectively, so frustrate the offender's reasonable expectation of liberty that it amounts to new or increased punishment? Stated differently, is the impact on liberty so significant and so different than that anticipated, that it has altered the effect of the original sentence?
- [31] To these consequences of Whaling, I would add four additional comments - some of which are related. These comments are relevant to a number of submissions made by counsel.
- [32] First, Wagner J. explained that, as in all Charter challenges, it is important to consider both the purpose and effect of the enactment at issue; Whaling at para. 64.
- [33] Second, Wagner J. emphasized a functional approach to assessing whether the enactment at issue constitutes "punishment". He considered and limited the scope of a prior case, *R. v. Rodgers*, 2006 SCC 15, in which the majority of the Court had established a two-part test to determine whether a sanction was punitive. Wagner J. considered that that test was "overly formalistic" and was directed to a different purpose - "namely to determine whether a discrete sanction constitutes 'punishment'"; Whaling at para. 52. He further considered that that test did not assist "in identifying situations in which, from a functional rather than a formalistic perspective," the harshness of the punishment had been increased; at para. 52.
- [34] This emphasis on the "functional" or "effective" result of a retrospective change in legislation on an offender's term of incarceration is found throughout Whaling. For example, Wagner J. concluded:
- "The effect of the retrospective application provision was to deprive the three respondents of the possibility of being considered for early day parole"; at para. 70.
 - "In my view, s. 10(1) had the effect of punishing the respondents again"; at para. 71.
 - "from a functional perspective, the new period of parole ineligibility thwarted the expectations of liberty of offenders..."; at para. 73.
 - "I have held that the legislative imposition of delayed day parole eligibility, by effectively prolonging the minimum period of incarceration of offenders "; at para. 83.
 - "Section 10(1) of the AEPA , in effect, withdrew the right to be considered for early day parole"; at para. 87.

- [35] This emphasis on a functional assessment of the provision in question was further refined in *Liang*. In *Liang*, the court again dealt with the AEPA, though the challenge was advanced under s. 11(i) of the Charter. Writing for the court, MacKenzie J.A. determined that the retrospective changes to the AEPA also violated the s. 11(i) Charter right of an offender to the benefit of the lesser punishment where the punishment has been changed between the commission of the offence and the time of sentence; at para. 45.
- [36] In *Liang*, MacKenzie J. A. said:
- [19] I agree with the Crown that in *Whaling* the Court found the effect, not the purpose, of the transitional provision on offenders already sentenced violated s. 11(h). But in my view, the Crown has inaccurately characterized the relevant "effect". In particular, I do not see "settled expectation of liberty" to be a psychological standard directed at vindicating the subjective expectation of offenders, but instead, an objective standard to determine whether the garnishment has in fact increased.
- [21] Thus, frustrating an offender's subjective expectations of liberty is not, as I understand Wagner J.'s reasons, the essential harm at play in these cases. An offender may have no familiarity with the parole system and therefore no "settled expectation" whatsoever, but that would not defeat the reasoning in *Whaling*. The point of focussing on the "expectations" of the offender is to determine the objective effect of retroactive changes.
- [23] In other words, I see the objectively ascertainable effect of "extended incarceration" as constituting the relevant punishment (at para. 71). On this analysis, where the effect of changes to the parole system appreciably increases the amount of time an offender would be incarcerated, in comparison to what he or she would have been expected to serve under the prior regime, it will constitute punishment. What matters is whether the changes "substantially increase the risk of additional incarceration", thereby frustrating an objective expectation of liberty, not whether the offender's subjective expectations have been dashed.
- [37] A third relevant aspect of the analysis in *Whaling* is its lack of reference to, or emphasis on, whether the changes brought about by retrospective legislation are procedural or substantive in nature. This is significant because a number of the cases relied on by the Crown, most of which predate *Whaling* and which address various other changes to the faint hope regime, concluded that the legislative change at issue was merely "procedural" in nature and therefore did not amount to punishment; see e.g. *R. v. Chaudhary* (1999), 139 C.C.C. (3d) 547, at para. 8 (Ont. S.C.J.); *Fabrikant v. Canada* (Attorney General), 2014 QCCA 240, at paras. 44-45; *Jenkins* at para. 100.
- [38] In *R. v. Dineley*, 2012 SCC 58, the majority held that when determining the temporal application of amendments, the key lies not in labelling provisions as "procedural" or "substantive" but, rather, in determining whether they affect "substantive rights"; at para. 11. The analysis in *Dineley*, however, only comes into play if there is no express transitional provision and a court is called upon to apply principles of statutory interpretation to determine the temporal application of the amendment. If legislation already contains a

transitional provision that clearly expresses a retrospective application, as in this case and in the cases I have referred to, Dineley does not apply. Rather, the only issue is whether the retrospective application of the amendment constitutes "punishment" as set out in Whaling and thereby violates s. 11(i) of the Charter.

- [39] It is important not to import the substantive/procedural distinction into the "punishment" analysis. A determination that a provision affects substantive rights does not necessarily make it "punishment". For example, the retrospective application of a prohibition order under s. 161 of the Code or of the Sexual Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA], has been held not to constitute "punishment" within the meaning of the Charter despite the fact that those changes may affect substantive rights; *P.S.C. v. British Columbia (Attorney General)*, 2007 BCSC 895, at paras. 119-128; *R. v. S.S.C.*, 2008 BCCA 262, at paras. 57-64; *R. v. K.R.J.*, 2014 BCCA 382, at para. 99, leave to appeal granted [2015] SCCA No. 36200. Further, the elimination of the SOIRA exemption does not constitute "punishment" within the meaning of the Charter; *R. v. P. (D.J.)* (6 January 2012), Victoria 147688-2 at para. 66 (BCSC).
- [40] Before me, both parties agreed that the pre-Whaling emphasis on the procedural or substantive nature of a provision was misplaced and both counsel accept that this Court should apply the Whaling test for punishment to determine whether the introduction of the judicial threshold hearing has impacted the applicant's settled expectation of liberty, or substantially increased the risk of his additional incarceration.
- [41] The fourth aspect of Whaling that warrants emphasis is that the Court, in addressing s. 10(1) of the AEPA, was dealing with a provision whose "effect... extended incarceration", "was automatic" and was made "without regard to individual circumstances"; at para. 71. As such, the case fell within the category of the "clearest of cases"; at para. 72. Wagner J. repeatedly emphasized that the impugned provisions before the court were "at one extreme"; at para. 60. They were changes that "so categorically thwarts the expectation of liberty of an offender" as to, again, qualify as the "clearest of cases"; at para. 60.
- [42] Wagner J. indicated that the question of whether "less drastic retrospective changes" constituted increased punishment was dependent on the circumstances and was a function of whether, at least in part, those changes "substantially increase the risk of additional incarceration"; Whaling at para. 63. To assist in addressing those cases that were "less drastic" or less clear, Wagner J. established a conceptual framework, to which I will return.
- [43] Counsel for Mr. Simmonds does not suggest that the 1997 Screening Amendment similarly constitutes an "extreme" or "clear" example of a provision that offends s. 11(i) of the Charter. He does, however, argue that the creation of a judicial screening stage, that "functionally" operates to limit the access of offenders to a jury charged with decision making under s. 745.63 of the Code, though "less drastic", is nevertheless a form of punishment and that the effect of such screening does "substantially increase the risk of incarceration" for offenders.

Analysis

[44] As with all Charter applications, the onus is on the applicant to establish a breach of s. 11(i) on the balance of probabilities. The Crown acknowledges that the facts of this case fall within the temporal scope of s. 11(i). The applicant, in turn, accepts that the purpose of the 1997 Screening Amendment was not punitive. Rather, Parliament's rationale for enacting those amendments was to ensure that only meritorious cases went before the jury, thereby protecting the families of victims who would otherwise have to sit through hearings that had no reasonable prospect of SUCCESS.

1) ADDRESSING THE CROWN'S SUBMISSIONS

[45] The various aspects and consequences of Whaling that I have identified dispose of a number of the Crown's submissions and properly focus the issue before me. The Crown raised the following issues, some of which are related, that I have chosen to address discreetly.

a) No Increase in Sentence

[46] The Crown emphasized, with some vigor, that the 1997 Screening Amendment did not increase the applicant's period of incarceration. That sentence was, at all times, 25 years.

[47] This submission ignores the import of Whaling and its emphasis on the legitimate parole expectations of an offender. In Whaling, the changes to the AEPA did not "increase" the length of the sentence of imprisonment of the three respondents before the Court. Instead, it retrospectively replaced their access to accelerated parole review after six months, or one-sixth of their sentence, whichever was longer.

[48] Indeed, Wagner J. expressly recognized, albeit in the context of s. 7 protection, that "[c]hanges to the parole system that add retrospectively to the offender's incarceration may violate s. 7 even if they do not affect the sentence itself"; Whaling at para. 58.

[49] The foregoing conclusion is supported by Liang where the Crown similarly argued that the "effect of the transitional provision does not increase the harshness of the punishment" because the "punishment was the sanction of imprisonment"; at para. 24. In response to that argument, MacKenzie J. A. said:

[24] This submission seems to assume that increasing the period of parole ineligibility cannot constitute punishment for the purposes of the Charter, which, on its face, runs directly contrary to the Supreme Court's finding in Whaling that these very provisions constitute "punishment".

See also Jenkins at paras. 58-59.

[50] The retrospective change considered by the court in Liang was again considered to be among the "clearest cases" of punishment; at para. 44.

b) No Assurance of Parole

- [51] The Crown argues that even a successful jury verdict does not guarantee that the applicant would be granted parole; it would simply allow him to make an application to the Parole Board. As such, it cannot be said that judicial screening increases an offender's punishment or thwarts any expectation of liberty.
- [52] Once again, this submission ignores the circumstances and reality of Whaling. APR did not assure or guarantee an offender early release. The APR process was automatic, and the test for release was based on a presumptive standard that was lower than the standard applicable to normal parole; Whaling at para. 13. Nevertheless, the offender had to meet that lower standard. Not all offenders would have. The fact that offenders still had to meet the necessary Parole Board threshold before being released, and the fact that some offenders would not do so, played no part in the court's assessment of whether the retrospective changes to the AEPA constituted additional punishment.
- c) The Judicial Screening Hearing does not "Eliminate" the Applicant's Right to Apply for Early Parole
- [53] The fact that a threshold judicial screening hearing does not "eliminate" an applicant's right to apply for early parole simply establishes that the addition of such hearings to the application process is not, as in Whaling, an "extreme" or "clear" example of a retrospective change that constitutes additional punishment.
- [54] Had the 1997 Screening Amendment also included a provision which limited the ability of an offender to make application for a reduction in their parole until either after, say, 20 years rather than 15 years, or not at all, the "effect" would have been very similar to the circumstances in Whaling. The offender would "automatically" be denied the right to make application for a reduction in their parole; Whaling at para. 60. That offender's "parole expectations", being able to make such an application after a certain length of incarceration, would have been "categorically thwart[ed]"; Whaling at para. 60. There would be little question that the change "substantially increase[d] the risk of additional incarceration"; Whaling at para. 63. There would also be little question that the "objective effect" of such a retrospective change would be to thwart an offender's settled expectation of liberty; Liang at para. 21.
- [55] Indeed, from a practical and empirical perspective, it could not be otherwise. Both counsel referred to statistical data from Public Safety Canada that indicated that nearly 80% of offenders who are able to advance their case before a jury are able to secure some reduction in their period of parole ineligibility. That data was clear, and there was no suggestion that it suffered from the kind of frailty that Pomerance J. referred to in Jenkins at para. 92.
- 2) THE REAL ISSUE

[56] The real issue before me is the question raised by the applicant. Did the 1997 Screening Amendment, though not a change that falls within the "clearest of cases", nevertheless, amount to an increase in punishment that can be said, on an objective basis, to thwart an offender's expectation of liberty?

[57] As a starting point, in 1995, at the time of Mr. Simmonds' offence, and prior to the 1997 amendments, s. 742 of the Code stated, in relevant part:

Sentence of life imprisonment

742. Subject to s. 742.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

- (a) in respect of a person who has been convicted of high treason or first degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentence;

[58] At that same time, s. 745(1) of the Code stated:

Application for Judicial Review

745. (1) Where a person has served at least fifteen years of his sentence

- (a) in the case of a person who has been convicted of high treason or first degree murder, or

he may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole.

- (2) On receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced having regard to the character of the applicant, his conduct while serving his sentence, the nature of the offence for which he was convicted and such other matters as the judge deems relevant in the circumstances and the determination shall be made by no less than two-thirds of the jury.

[59] By 2000, at the time of Mr. Simmonds' sentencing and following the 1997 amendments, the sentence set out in s. 742(a) had been renumbered to become s. 745(a) and the faint hope application described in s. 745 had been renumbered to become ss. 745.6-745.64.

[60] In *R. v. Kay*, 1990 ABCA 317, (sub. nom. *R. v. Bowen*) 59 C.C.C. (3d) 515, the Alberta Court of Appeal addressed an offender's ability to apply, after 15 years, to remove the 25-year ineligibility condition and said:

- [18] Even when all that is proved, Parliament does not really deny the accused all chance of parole for 25 years. In form that may be the sentence; but in form the sentence (like many others) is for life imprisonment. Section 745 (old s. 672) of the Code allows the convict to apply after 15 years to reduce or remove the 25-year ineligibility. His application is to a new jury.
- [19] It is only about 16 years since that provision has applied, and so only a few convicts have served the 15 years and been eligible to invoke it. The Attorney General of Alberta has examined the records across Canada. He showed us that a number of such convicts have applied. All applicants but one succeeded in thus getting a marked acceleration of parole. One cannot predict what future juries will do. But these figures do show that the provision for possible parole eligibility after 15 years is not illusory. It is the 25 years which is the more theoretical figure.
- [24] Turning to possibilities of parole, here the effective sentence is a minimum of 15 years without parole eligibility. As noted, parole can be permitted after about 15 years. The apparent 25-year minimum is purely procedural; it is not real.
- [61] The assertion that the 25-year period of ineligibility is "not real" may be too strong. Nevertheless, the statistical data I was provided with established that in the period prior to the 1997 Screening Amendment, approximately 80% of offenders who made application to a jury for a reduction in their period of ineligibility were successful in doing so; Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 303, 305.
- a) Did the 1997 Screening Amendment "Concern Punishment"?
- [62] The Crown argues that the 1997 Screening Amendment did not change either the sentence served by the applicant or the conditions of that service and that it is not, accordingly, concerned with punishment.
- [63] Very similar arguments were advanced and dismissed in *Jenkins*. *Jenkins* was, as I have said, concerned with the 2011 amendments to the faint hope provisions of the Code that raised the standard the screening judge was to apply to a "substantial likelihood" of success.
- [64] The purpose of both the 1997 Screening Amendment and of the amendments at issue in *Jenkins* was, in very large measure, to restrict juries from hearing unmeritorious cases, and to thereby protect the families of victims from the emotional pain of participating in unnecessary hearings; *Jenkins* at paras. 20, 82. Both are examples of retrospective legislative amendments that "filter" or "screen" the number of eligible offenders who can advance their case before a jury after serving a minimum of 15 years of their sentence.

- [65] In Jenkins, at para. 66, Pomerance J. first turned to those comments in Whaling, at para. 57, that drew a distinction between changes to the conditions of a sentence that amount to new punishment and those "various changes in the management of an offender's parole" that were not punitive, though they might "engage the offender's liberty interest by marginally increasing the likelihood of additional incarceration".
- [66] Thereafter, Pomerance J. concluded that the "screening standard" she was addressing did concern the sentence served by an offender, rather than merely the conditions under which that sentence was served. She was satisfied that the amendment before her was directed to "eligibility for parole", rather than actual parole or suitability for parole; Jenkins at para. 68. As such, she determined that "[w]here the offence of murder is concerned, parole eligibility is an integral part of the sentence imposed for the crime"; at para. 70.
- [67] Pomerance J. then supported her conclusion by reference to the history of the faint hope provisions, the structure and language of the Code, a number of relevant authorities, and the position of the government on the amendments as reflected in Hansard transcripts; Jenkins at paras. 71-75.
- [68] Further guidance is found in Liang at para. 12, where MacKenzie J. A. relied on the portion of Whaling at para. 74 where Wagner J. had stated that the "greater the likelihood of incarceration" the more likely the change will be considered punishment. Furthermore, MacKenzie J.A., as I have said, rejected the proposition that "increasing the period of parole ineligibility" could not constitute punishment for the purposes of the Charter; Liang at para. 24.
- [69] The objective "effect" of any screening stage or device will be to prevent some offenders from applying to a jury to reduce their period of parole ineligibility. Indeed, that is its intended effect. This gives rise to the further "effect" that the actual period of incarceration for such offenders could be extended.
- [70] Accordingly, I am satisfied that the 1997 Screening Amendment is directed to parole eligibility, that it directly concerns the sentence served by an offender, and that it concerns punishment rather than the conditions under which a sentence is served. This, however, is merely a threshold consideration in establishing whether the amendment amounts to an impermissible, at least as it applies retrospectively, increase in punishment; Jenkins at para. 77.
- b) Other Cases that Involved Some Form of Screening
- [71] The legislative history of the faint hope regime that I described earlier has given rise to a series of retrospective legislative changes that were both intended to and have served to either restrict an offender's access to a jury or the jury's ability to reduce parole ineligibility. There have been three such changes, each of which has been judicially considered.
- i) The 1997 Screening Amendment

- [72] The constitutional validity of the 1997 Screening Amendment was recently considered in *Fabrikant* where the Québec Court of Appeal determined that the "two-stage" process that required an initial judicial screening stage did not offend either ss. 11(i) or 7 of the Charter. The court also addressed the 1997 amendments that required jury unanimity. The usefulness of the decision is, however, with respect, diminished by several factors.
- [73] First, *Fabrikant* predates *Whaling* and was decided without the Supreme Court of Canada's guidance as to the applicability of s. 11 in the post-sentencing context. The court, in *Fabrikant*, affirmed the trial judge's conclusion that s. 11 of the Charter was not engaged because Mr. *Fabrikant* was no longer a "person charged with an offence" within the meaning of s. 11; at para. 37. In *Whaling* at paras. 31-42, however, the Court determined that s. 11 was engaged post-sentencing in the context of applications for early day parole. The Crown accepts that the same reasoning pertains in this case, and that the comments of the court in *Fabrikant* that pertain to s. 11 are no longer valid.
- [74] Having decided that s. 11 of the Charter was not engaged, the court, in *Fabrikant*, then focused on the s. 7 Charter issue. In *Whaling* at para. 58, Wagner J. emphasized that ss. 11 and 7 protect different interests. Accordingly, some caution has to be exercised in extrapolating an analysis undertaken under s. 7 to s. 11(i).
- [75] In addition, much of the *Fabrikant* judgment, whether it addressed the introduction of the judicial screening process or the need for jury unanimity, addressed the question before the court by asking whether the amendment was procedural or substantive in nature. Thus, the court concluded:
- [44] We agree with Brunton J. that Bill C-45 merely changed the procedure in respect of which Mr. *Fabrikant*'s motion would be treated and that neither the two-stage process nor the unanimity rule affect his substantial rights in a manner that infringed the Charter. The judge correctly pointed out that it is not merely because the route to granting a successful motion is made more difficult that the principles of fundamental justice under s. 7 have been breached (paragraph [27] of the interlocutory judgment of April 25, 2008). The amendments do not substantively change the right to apply for a reduction in parole ineligibility.
- [45] The impugned amendments, including the jury unanimity rule, affect the procedure by which a person achieves the right to apply for parole, but they do not affect the appellant's substantive rights in respect of his sentence or the terms of his release.
- [76] For reasons that I have addressed, this analytical lens, respectfully, is not useful and does not align with the guidance in *Whaling*.
- [77] Finally, the *Fabrikant* court adopted the chamber judge's comments and analysis when distinguishing *R. v. Gamble*, [1988] 2 S.C.R. 595, a case which was, again, decided under s. 7 of the Charter:

- [51] We agree with the manner in which the judge distinguished Gamble from the present case:
- [23] This Court holds that Gamble is distinguishable. Gamble dealt with a situation where a convicted person was being denied access to a status which existed in law at the moment she was sentenced. When the Petitioner was sentenced, he had access to judicial review after 15 years in order to seek a reduction in his parole ineligibility. The amendments to the judicial review procedure have not altered that situation. As on the day he was sentenced, he is subject to imprisonment for life, without possibility of parole for 25 years and he can seek a review of that latter status after 15 years.
- [24] As a result, the Court holds that the amendments to the judicial review procedure do not deprive the Petitioner of liberty so as to permit him to invoke s. 7 of the Charter. The same conclusion was reached in the case of *R. v. Chaudhary*, 139 C.C.C. (3d) 547, at para. 11 (Ont. S.C.), motion seeking permission to appeal dismissed, [2000] 1 S.C.R. viii.
- [78] These comments very much align with the Crown's submissions and adopt a standard that would only apply to the "clearest of cases" contrary to the Whaling guidance that "less drastic retrospective changes" may engage s. 11; at para. 63. It is not only changes to the "possibility of parole after 25 years" and to the availability of a "review after 15 years" that may offend s. 11(i). Rather, there can be retrospective legislative amendments that so erode or so effectively filter an offender's ability to make an application for a review of their parole ineligibility as to offend s. 11(i).

ii) The 1997 Jury Unanimity Requirement

- [79] The 1997 amendments retrospectively required a jury to be unanimous in their decision to reduce parole ineligibility. Previously, the period of parole ineligibility could be reduced based on the decision of only two-thirds of the jury. The constitutional validity of these amendments was challenged in *Chaudhary*.
- [80] *Chaudhary* was decided under s. 7, focused almost entirely on whether the changes at issue were procedural or substantive, and determined that there was nothing in the amendments that made the exercise before the jury "practically impossible"; at para. 9. The court concluded:
- [11] This legislation does not change the applicant's right, that is the right to apply to have her period of parole ineligibility reduced. It does not lengthen her sentence. It does not increase her period of ineligibility. What it does do is simply change the manner in which she is required to establish the right to seek earlier parole. The applicant has not had her right to parole nor even her right to apply for parole changed by the amendments. Her pre-existing right was simply to ask the Court to permit her the right to seek parole. That has not changed. The change is in how she achieves the right to apply and that, in my opinion, is procedural, not substantive. The new legislation, therefore, is retrospective and not in violation of s. 7 of the Charter of Rights and Freedoms.

iii) The 2011 Increase in the Screening Standard

- [81] The 2011 amendments changed the threshold judicial screening test in s. 745.61 of the Code from a "reasonable prospect that the application will succeed" to a "substantial likelihood that the application will succeed" and were addressed in Jenkins. Applying the Whaling analysis, Pomerance J. concluded that though some offenders might serve a longer sentence under the new screening threshold, it could not be said that the amendment added to or increased "punishment" or frustrated or thwarted an offender's "settled expectation of liberty"; paras. 5, 104.
- c) Application of the Foregoing Considerations: Did the 1997 Screening Amendment Amount to a Change in Punishment Contrary to s. 11(i)?
- [82] The various retrospective screening or filtering amendments to the faint hope regime that have been enacted over time have all made either accessing a jury or having a jury reduce an offender's period of parole ineligibility more difficult. Each has served to limit the prospect of changing an offender's parole ineligibility. Each, in a sense, is a "less drastic change" that "increases the risk of additional incarceration". Each, notwithstanding the points of distinction I have raised, has withstood Charter scrutiny.
- [83] The applicant argues, however, that the 1997 Screening Amendment is a filter that is different in kind. He argues that the task of a jury in a faint hope application is fundamentally different from the role of other juries or the role of a judge in a judicial screening review. It is in the nature of an act of clemency, and is based on the broad factors identified in s. 745.63 of the Code, and the largely unfettered discretion described in Swietlinski at 493-494 and cited above. Judicial screening, it is argued, usurps the jury's broad discretion to grant relief. To this end, the applicant relies heavily on Pomerance J's obiter comments in Jenkins:
- [99] Had Parliament abolished faint hope for offenders in the system, this would have increased punishment. It would have been the functional equivalent of the legislation in Whaling, which eradicated the possibility of early parole. Had judicial screening been introduced for the first time, this too would have represented a significant change to the process. As discussed above, judicial screening curtails offenders' rights to plead for clemency before a jury. I refrain from commenting on the Charter implications of screening as a general concept. What is significant for present purposes is that screening was already in place at the time the applicant committed this offence, and the time that he was convicted of it. The applicant has no legitimate basis on which to claim to unfettered access to a jury.
- [84] I accept that judicial screening within the faint hope regime impedes an offender's unfettered access to a jury. I do not, however, accept the applicant's central thesis for three reasons.

- [85] Firstly, it is necessary to focus on the guiding principle emanating from Whaling, "the greater the likelihood of additional incarceration" the more likely a change will be considered to be additional punishment; at para 74; Liang at para 22.
- [86] From a "functional" perspective, how significant is the imposition of a judicial screening process, particularly when compared to other types of screening? At one time the "reasonable prospect" standard was equated with a "not hopeless" standard; R. v. Kent, 2001 MBQB 350, at para. 44. In R. v. Phillips, 2012 ONCA 54, at paras. 5-6, the Ontario Court of Appeal disagreed with the "not hopeless" standard expressed in D.E.K. and other cases, and determined that the normal meaning of "reasonable prospect" suggested a higher test. Thereafter, the 2011 amendments raised this standard to a "substantial likelihood" that an applicant would succeed.
- [87] In real terms, how does introducing judicial screening interfere with, or thwart, or frustrate an offender's expectation of liberty any more than increasing a screening threshold from what was interpreted as "not hopeless" to "a substantial likelihood that the application will succeed"? Which functionally has the greater prospect of preventing any decrease in an offender's period of parole ineligibility? Which functionally has the effect of "increasing the likelihood of additional incarceration"?
- [88] Second, and in a similar vein, the assessment of an offender's expectation is determined with reference to the "objective effect" of retrospective changes; Liang at para. 21. This determination is not made with reference to the individual expectations of offenders; Liang at paras. 19-20.
- [89] Third, Wagner J. expressly addressed the prospect of "less drastic" retrospective changes and how to weigh or assess such changes. He acknowledged that some "line drawing" was necessary (Whaling at para. 59) and said:
- [63] Whether less drastic retrospective changes to parole constitute double punishment will depend on the circumstances of the particular case. Generally speaking, a retrospective change to the conditions of a sentence will not be considered punitive if it does not substantially increase the risk of additional incarceration. Indicators of a lower risk of additional incarceration include a process in which individualized decision making focused on the offender's circumstances continues to prevail and procedural rights continue to be guaranteed in the determination of parole eligibility. Though I caution against directly importing principles drawn from the s. 7 jurisprudence into this context, the replacement of an automatic release system with a discretionary release system was found to be constitutional in Cunningham owing in part to various procedural safeguards, including a hearing and the entitlement to counsel. While s. 11(h) is not directly concerned with procedural safeguards, the presence or absence of such safeguards is relevant in considering the likelihood of the punishment's severity being increased. As I mentioned above, the dominant consideration will be the extent to which the offender's settled expectation of liberty has been thwarted. A change that directly results in an extension of

the period of incarceration without regard to the offender's individual circumstances and without procedural safeguards in the assessment process will clearly violate s. 11(h).

- [90] The foregoing comments are directly relevant. Though the applicant's expressed concerns rely heavily on the nature and function of judicial screening and on how that function compares with the role of a jury acting within the faint hope regime, the concurrent reality is that the judicial screening process imports the highest level of "individualized decision making" that is "focused on the offender's circumstances". It is the very circumstances of the particular applicant that will be considered by the screening judge. This is to be compared with the automatic or across-the-board imposition of a higher screening standard, or the automatic or across-the-board requirement for jury unanimity - both of which have been determined to be Charter compliant; Chaudhary at para. 11; Jenkins at para. 104.
- [91] Ultimately, the issue is not how or through what means the faint hope application makes its way to the jury. For this reason, I do not accept the emphasis the applicant places on the differences in the nature of the role of the screening judge and the role of the jury on a faint hope application. The test in Whaling does not focus on how a particular screen, or threshold, or filter works. Instead, the question, at all stages, is the degree to which any retrospective change "impacts an offender's settled expectation of liberty" and/or the extent to which that change increases "the risk of additional incarceration."

Conclusion

- [92] The applicant has failed to demonstrate that the retrospective application of the judicial screening under s. 745.61 violates s. 11(i) of the Charter. While the addition of a filter concerns punishment, in that it is directed at parole eligibility, it does not increase punishment. The application for a declaration that the 1997 Screening Amendment is unconstitutional is dismissed.

"Voith J."

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